No. 13397

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Don Marx,

Appellant,

vs.

United States Fidelity and Guaranty Company, a corporation,

Respondent.

RESPONDENT'S REPLY BRIEF.

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RESPONDENT'S REPLY BRIEF.

Jurisdiction.

The appellant, Don Marx, filed an action for wrongful attachment against the respondent, United States Fidelity and Guaranty Company, in the District Court of the United States, Southern District of California, Central Division [Tr. pp. 2-9].

The Complaint [Tr. p. 2], the Stipulation and Order, hereinafter referred to as the Stipulation [Tr. p. 14] and the Findings of Fact and Conclusions of Law, hereinafter referred to as the Findings [Tr. p. 43] each recite that the appellant was and now is a resident of California.

The Complaint [Tr. p. 2], the Stipulation [Tr. p. 14] and the Findings [Tr. p. 43] set forth the fact that the respondent corporation was organized and existing under the laws of the State of Maryland and doing business in the County of Los Angeles, State of California.

The Complaint [Tr. pp. 3-6], the Stipulation [Tr. p. 14] and the Findings [Tr. pp. 43-50] each disclose that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

Pursuant to the Stipulation [Tr. pp. 14-21], that the only issue to be determined by the court was the amount of damages the appellant, Don Marx, was entitled to recover from the respondent, United States Fidelity and Guaranty Company, the Honorable Harry C. Westover of the aforesaid District Court on March 31, 1952, caused a judgment in the sum of $25.00 to be entered in favor of the appellant [Tr. pp. 51-52].

Thereafter and on April 25, 1952, the appellant filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit [Tr. p. 53]. In addition to the said notice of appeal the said appellant filed simultaneously a statement of points on appeal and assignment of error [Tr. p. 54], and a designation of contents of record on appeal [Tr. p. 55]. A supplemental designation of contents of record on appeal [Tr. p. 57] was filed on April 29, 1952.

The jurisdiction of the District Court was based upon the amount in controversy exceeding the sum of $3,000.00, exclusive of interest and costs (62 U. S. Stat. 930, 28

U. S. C. A., Sec. 1331) and upon the fact that there was a diversity of citizenship between the parties to the said action (62 U. S. Stat. 930, 28 U. S. C. A., Sec. 1332). Jurisdiction in this court of appeals is based upon its right to review by appeal a final judgment of a district court embraced within its area of jurisdiction (62 U. S. Stat. 929, 28 U. S. C. A., Sec. 1291; 62 U. S. Stat. 930, 28 U. S. C. A., Sec. 1294).

Statement of the Case.

Inasmuch as the respondent controverts the Statement of the Case set forth in appellant's brief in two particulars, and because we deem it inadequate in other respects, we are supplementing the Statement of the Case as follows: The appellant was a resident of California [Complaint, Tr. p. 2; Stipulation, Tr. p. 14; Findings, Tr. p. 43]. The respondent was a corporation organized in the State of Maryland [Complaint, Tr. p. 2; Stipulation, Tr. p. 14; Findings, Tr. p. 43]. The appellant by his Complaint against respondent for a wrongful attachment seeks damages in the sum of $9,861.78 [Complaint, Tr. pp. 2-18].

On December 17, 1947, one Andre Dusel commenced an action in the Superior Court of the County of Los Angeles for the recovery of $9,861.78 against the appellant, Don Marx, entitled "Andre Dusel, Plaintiff, vs. Don Marx, Don Marx, doing business under the firm name and style of Coronet, *et al.*," numbered 538,461 [Complaint, Tr. p. 3; Stipulation, Tr. pp. 14-15, and Findings, Tr. p. 44]. At the time said action was instituted

and on December 17, 1947, said Andre Dusel made application for a writ of attachment, whereupon the respondent, United States Fidelity and Guaranty Company, executed an undertaking whereby it obligated itself to pay all costs to the defendant Marx if he recovered judgment and all damages [Complaint, Tr. pp. 3-8; Stipulation, Tr. pp. 15-17, and Findings, Tr. pp. 44-47] which defendant may sustain by reason of such judgment. Thereupon a writ of attachment issued and was executed by the Sheriff of Los Angeles County, who took possession of stock and equipment in said Coronet Restaurant on December 17, 1947, and retained possession thereof until January 22, 1948 [Complaint, Tr. p. 5; Stipulation, Tr. p. 18, and Findings, Tr. p. 47]. On January 8, 1948, the appellant herein filed a proceeding for an arrangement under Chapter 11 of the Act of Congress relating to bankruptcy, and was adjudged a bankrupt on March 9, 1948 [Stipulation, Tr. p. 19, and Findings, Tr. p. 48]. On January 16, 1948, the appellant Don Marx was duly discharged in said bankruptcy proceedings [Stipulation, Tr. p. 19, and Findings, Tr. p. 48]. On May 24, 1949, the trustee in bankruptcy abandoned the cause of action for wrongful attachment to the appellant herein [Stipulation, Tr. p. 19, and Findings, Tr. p. 49].

On December 17, 1947, the date upon which the writ of attachment was issued, the appellant was the lessee of the Coronet Restaurant [Stipulation, Tr. p. 19; Findings, Tr. p. 48]. On September 12, 1950, the Superior Court of Los Angeles County rendered judgment against Andre Dusel in favor of Don Marx in said action No. 538,461.

No appeal was taken from the judgment and it has become final. Prior to the bringing of the within action appellant demanded payment of his damages for such attachment from the said Andre Dusel [Stipulation, Tr. pp. 19-20; Findings, Tr. p. 49].

On January 6, 1948, the lessor of said Coronet Restaurant served the appellant Don Marx with a Notice to Quit the Premises for Non-payment of Rent for the month of January, 1948 [Stipulation, Tr. p. 19; Findings, Tr. p. 48]. The parties hereto stipulated to all facts except the amount of damages which the appellant Don Marx was to recover from the respondent, United States Fidelity and Guaranty Company, a corporation [Stipulation, Tr. pp. 14-21]. Subsequently thereto and on January 8, 1948, the appellant filed a proposed Plan of Arrangement under Chapter 11 of the Act of Congress relating to bankruptcy wherein he stated that the said Coronet Restaurant had been operated at a loss from January, 1947 to December 17, 1947 [Stipulation, Tr. p. 19; Findings, Tr. p. 48]. Notwithstanding this, the appellant on March 24, 1952, filed in the within action a written offer of proof wherein he offered to prove by the oral testimony of himself and that of his former partner, Al Swartz, a purported expert on the operation of restaurants, that during the period from December 17, 1947 to March 8, 1948, the reasonable value of the said restaurant was $200.00 on Saturdays, Sundays and holidays and $100.00 a day for every remaining day of the said period of time and that the said restaurant was worth the sum of $50,000.00 [Tr. pp. 28-33].

The court thereafter rendered an opinion [Tr. pp. 34-41] wherein it ordered judgment in favor of the appellant for the sum of $25.00. Findings of Fact and Conclusions of Law were prepared and filed. In the opening paragraph of the Findings the court stated that it considered the pleadings, the Stipulation of the parties, an examination of the Petition for an Arrangement filed by the appellant, the request of appellant that the court hear evidence set forth in his offer of proof and the Memoranda of Authorities by Counsel. The court refused, however, to hear any oral testimony [Findings, Tr. pp. 43-50]. Subsequently thereto and on the 31st day of March, 1952, a judgment was entered in favor of the appellant in the sum of $25.00 [Tr. pp. 51-52]. The appeal is from such judgment.

The appellant in his opening brief states, "* * * appellant made demand for payment of his damages suffered by reason of the attachment upon Andre Dusel and upon respondent, his surety." In the Stipulation it is stated that the demand was made on Andre Dusel [Tr. p. 20].

Appellant in his brief further states that the rent on the Coronet Restaurant was paid for the month of January, 1948 (App. Op. Br. pp. 5-6), whereas in the Stipulation it is stated that on January 6, 1948, a Notice to Quit Said Premises was served upon appellant for nonpayment of rent for the month of January, 1948 [Tr. p. 19].

ARGUMENT.

I.

An Appellate Court Should Not Reverse a Judgment Which Is Supported by Substantial Evidence.

The jurisdiction of an appellate court begins and ends with its determination that the judgment is supported by substantial evidence.

Estate of Boggs, 19 Cal. 2d 324, 121 P. 2d 678.

If the judgment is supported by substantial evidence and if there are no prejudicial errors in the record, the judgment should be affirmed.

Jones v. Rutherford, 8 Cal. 2d 603, 67 P. 2d 92.

The measure of damage for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention.

Atlas Development Co. v. National Surety Co., 190 Cal. 329, 212 Pac. 196;

Dunlop v. Farmer, 64 Cal. App. 691, 222 P. 2d 640;

Hurd v. Barnhart, 53 Cal. 97;

National Surety Co. v. Jean, 36 F. 2d 468.

In *Atlas Development Co. v. National Surety Co.,* 190 Cal. 329, 212 Pac. 196, the court stated:

> "* * * There is no ground to question that a proper and recognized measure of damages for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention * * *."

Appellant herein asserts that he is entitled to damages as follows: loss of goodwill, $10,000.00; loss of value of the use of the property during detention, $200.00 per day on holidays, Saturdays and Sundays, $100.00 per day during the balance of time the property was wrongfully withheld; loss of profit from a contemplated sale of the leasehold and fixtures, $10,000.00. We submit that such elements of damage are remote and speculative and are therefore not proper items of damages.

In *Atlas Development Co. v. National Surety Co., supra,* the defendant therein had attached an oil rig belonging to the plaintiff and used in the County of Contra Costa, California. The attachment was wrongful. In an action for damages the plaintiff therein offered evidence that he had contracted to sell the oil rig to a business concern in Texas and also evidence of his loss by reason of the delay in shipping the said rig to Texas. In excluding such evidence the court said,

> "* * * It is clear at once that such a measure of damages, particularly when not shown to have been within the contemplation of the surety corporation, would be remote, speculative and uncertain."

See also:

Gilmore v. Thwing, 9 P. 2d 775;
Hurd v. Barnhart, 53 Cal. 97.

The period for which the appellant is entitled to damages is from December 17, 1947, when the attachment was made until January 8, 1948, the day the appellant filed a voluntary petition in bankruptcy.

See:

National Surety Co. v. Jean, 36 F. 2d 468.

"* * * That substantial injury may have been suffered as between the date of the filing of the affidavit in attachment * * *, and the date of adjudication in voluntary bankruptcy, * * * cannot be denied.

"* * * We cannot view the filing of a voluntary petition in bankruptcy as other than wholly independent of and disconnected from the wrongful attachment, whether dictated by motives of equality of treatment to all creditors or a determination to at least defeat payment in full to the attaching creditors. There was nothing compulsory in this voluntary act on the part of appellee. Injury to credit, loss of profits, diminution of business, or other loss directly attributable to the attachment might be recovered, but the period for the computation of such damages ended, so far as damage to her business was concerned, with the filing of the bankruptcy petition * * *"

The evidence in the record on the nature and extent of damages was given by the plaintiff in his voluntary petition for bankruptcy. The plaintiff stated that the Coronet Restaurant had been operated at a loss for the eleven months preceding the attachment. We submit that such evidence is substantial and that it does support the judgment. Under such circumstances, the judgment should be affirmed.

Jones v. Rutherford, 8 Cal. 2d 603, 67 P. 2d 92.

We submit that the appellant has failed to show that he has sustained any actual damages. Under such circumstances only nominal damages can be allowed.

Peterson v. Weisner, 62 Nev. 184, 146 P. 2d 789;

Bartley v. J. M. Radford Grocery Co., 15 S. W. 2d 46.

While the appellant made an offer of proof on the subject of damages which was excluded, but which if admitted would have only raised a conflict with other evidence offered by him, there was no prejudicial error committed in excluding this offer of proof. The propriety of the trial court's action in respect to the exclusion of the offer of proof is discussed in a subsequent portion of the brief.

Upon adjudication of bankruptcy, title to the bankrupt's property vests in the trustee as of the date of filing the petition.

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 75 L. Ed. 645, 51 S. Ct. 270.

The trustee in bankruptcy must manage and conserve the bankrupt's property to the end that it might be impartially distributed to the bankrupt's creditors.

A trustee in bankruptcy is not bound to accept property of a bankrupt which is onerous or of an unprofitable character.

See:

National Bank v. Lasater, 196 U. S. 115, 49 L. Ed. 408, 25 S. Ct. 206.

In the case at bar the trustee did not abandon the cause of action for wrongful attachment until May 24, 1949, long after the appellant had been discharged as a bankrupt.

We submit that the action of the referee in bankruptcy in abandoning said cause of action is further evidence that the appellant did not sustain any substantial damage by reason of the attachment.

Appellant cites several cases for the proposition that he should be able to recover substantial damages even though the restaurant had not been operating at a profit. We contend that the cases cited by appellant do not support his assertion.

For instance, in *Osborne v. Durbin,* 301 Ky. 412, 192 S. W. 2d 198, the court held that, while the evidence was conflicting on the rental value of the property attached, the judgment was supported by substantial evidence. In *Scott v. Daggett,* 226 S. W. 2d 183, the court merely stated the general rule for damages for wrongful attachment. In *State for Use of Parkersburg Corporation Paper Co. v. U. S. F. G.,* 81 W. Va. 749, 95 S. E. 783, the court refused to decide the contention of the parties as to the item of damage of loss of profits, stating that there was substantial proof of other damages to the extent of the amount of the judgment.

II.

It Is Not Reversible Error to Exclude Evidence Which if Admitted, Would Not Affect the Decision on a Material Fact.

The appellant in his Proposed Plan of Arrangement filed with the Bankruptcy Court on January 8, 1948, stated that from January, 1947 until August, 1947, the said Coronet Restaurant was operated at a loss and consumed his capital reserve; that on August 5, 1947, he entered into an agreement with Andre Dusel, an experienced restaurant operator, wherein it was agreed that the said Andre Dusel should operate the restaurant, but that the operation of the restaurant by Andre Dusel was not profitable [Tr. pp. 23-24]. Consequently, there is a sworn statement by the appellant to the effect that from January, 1947 to December, 1947, eleven months, the restaurant was operated at a loss.

Under date of March 24, 1952, the appellant filed written offers of proof [Tr. pp. 28-33] wherein he offered to produce himself and Al Swartz, his former partner in said restaurant business as an expert witness on the value of the said restaurant and of the profit that could be realized from its operation from December 17, 1947, the day the attachment was run, to January 8, 1948, the day appellant filed his voluntary petition in bankruptcy. This, of course, only raises a conflict with his sworn statement of January 8, 1947.

In the Findings the District Court stated:

> "The above-entitled matter was considered by the Court upon the basis of the pleadings, the Stipulation of the parties, an examination of the Petition for an Arrangement filed by plaintiff, Don Marx, in the above-entitled Court, bearing No. 45,569 PH,

in the files of said Court, the request of plaintiff that the Court hear the evidence set forth in his Offer of Proof submitted to the Court, which request was denied by the Court, and the Memoranda and Authorities of Counsel; the Court refusing to hear any oral testimony, the Court now makes its Findings of Fact as follows:"

This matter was tried without a jury. Thus we see that while the trial court did not permit the appellant to produce oral testimony in support of his offer of proof, it did review such offer and consider such offer and the substance thereof in reaching its decisions.

It is not reversible error to exclude evidence which could not affect the decision on a material fact.

See:

Steiner v. Long Beach Local No. 128, 19 Cal. 2d 676, 123 P. 2d 20;

Adams v. Cook, 15 Cal. 2d 352, 362, 101 P. 2d 484;

Linden v. Rubens, 76 Cal. App. 2d 688, 173 P. 2d 713.

In the case of *Linden v. Rubens, supra,* the court at page 692 stated:

"The rejection of the testimony of Frank Rubens was the privilege of the trial judge; in fact, it was his duty to reject it if it did not have a convincing quality. Indubitably the court was influenced by Frank's statement on January 19 that Arons had paid $7,200 for the bankrupt stock whereas the files of the bankruptcy proceeding disclosed that only $3,000 had been paid by Arons for all the merchandise. It is strictly the function of the trial judge to determine the ultimate facts from a consideration of all the evidence submitted. His findings in the absence of

prejudicial error will not be disturbed and they should be given the benefit of every reasonable inference fairly deducible from the evidence. (*Herbert's Laurel-Ventura, Inc. v. Laurel Ventura Holding Corp.,* 58 Cal. App. 2d 684, 690 (138 P. 2d 43); *Lorraine v. City of Los Angeles,* 55 Cal. App. 2d 27, 30 (130 P. 2d 140).)"

We submit that the testimony of the so-called expert witnesses, as set forth in the offer of proof, did not have any convincing quality when compared with the positive testimony by the appellant of the reasonable value of said property for loss of use during its period of detention, and particularly when the appellant's first testimony on value of loss of use was given at the time the said restaurant was under attachment.

The admission of expert testimony rests largely in the discretion of the trial court. Therefore, we respectfully submit that there was no reversible error in excluding the oral testimony of the so-called expert witnesses as contained in the said offer of proof.

Gilbert v. Gulf Oil Corp., 175 F. 2d 705.

"* * * questions as to admissibility of expert testimony should be left to the wise discretion of the trial judge * * * But in the exercise of this discretion, the court must still determine whether the subject matter of the suit is such that the issues cannot be properly understood or determined without the aid of opinion of persons of special knowledge or experience, * * *."

The appellant cites the case of *Builders Steel Co. v. Commissioner of Internal Revenue,* 179 F. 2d 377, in support of his position that the trial court should have admitted the oral testimony set forth in his offer of proof.

We submit that the case does not support the appellant, as in that case the court excluded competent and material evidence. We have demonstrated that the offer of proof was not competent or material and at best would have only raised a conflict in the evidence and would not have affected the judgment.

When the entire transcript is considered it is evident that there is no prejudicial error. Therefore, the case of *United States v. United States Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 746, 68 S. Ct. 525, cited by appellant has no application to the case at bar.

III.

It Is Not Reversible Error to Exclude Evidence Offered by a Party Which if Admitted, Would Only Raise a Conflict With Former Evidence Given by Such Party.

As previously mentioned, the appellant in a verified document, had stated that the restaurant operated at a loss from January, 1947 to August, 1947, and from August, 1947 to December, 1947, the operation of the restaurant was not profitable. By his offers of proof the appellant offered to produce so-called expert witnesses that the restaurant could have been operated at a profit from December 17, 1947, the date the attachment was run, until he, the appellant, filed his voluntary petition in bankruptcy on January 8, 1948.

We submit that the evidence contained in the offer of proof, if admitted, would only raise a conflict with other testimony given by the appellant.

It is not reversible error to exclude evidence offered by the appellant party which, if admitted, would only raise a conflict with other evidence given by the appellant.

In *Collins v. Calif. Street Cable R. R. Co.,* 91 Cal. App. 752, 756, 267 Pac. 731, the court stated:

> "The appellant assigns as error the ruling of the trial court in striking out the answer of the motorman of the west-bound car as to what he thought the respondent was going to do when he saw him standing between the rails, and also the answers of this and another witness that it was a matter of frequent occurrence to see pedestrians standing in safety between the tracks as cars passed going in opposite directions. We see no error in these rulings. The fact that the motorman of the west-bound car gave such vociferous warnings of his approach supported the inference that he knew the respondent was in a perilous position and likely to be struck by his approaching car while his statement that he thought that the respondent was intending to board the east-bound car merely created an inconsistency with his positive testimony of what he saw and knew. * * *"

See also:

Almaden Vineyards Corp., etc. v. Arnerich, 21 Cal. App. 2d 701, 70 P. 2d 243;

Steiner v. Long Beach Local No. 128, 19 Cal. 2d 676, 123 P. 2d 26;

Adams v. Cook, 15 Cal. 2d 352, 101 P. 2d 484;

Linden v. Rubens, 76 Cal. App. 2d 688, 173 P. 2d 713.

Conclusion.

We submit that there is no prejudicial error nor any error in the record and that therefore the judgment should be affirmed.

Respectfully submitted,

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